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Harvey A. Sjostrom v. Theral V. Bishop and Ross L. Covington : Brief of Petitioner

Utah Supreme Court

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In The Supreme Court of the
State of Utah

UNIVERSITY OF UTAH

JUN 30 1964

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HARVEY A. SJOSTROM,
Petitioner,

vs.

THERAL V. BISHOP and
ROSS L. COVINGTON,
Respondents.

Case No. 10054

Brief of Petitioner

FILED
MAR 26 1964

ORIGINAL PETITION TO THE SUPREME COURT
FOR EXTRAORDINARY WRIT

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NATURE OF CASE

Action by petitioner commenced in this Court for an Extraordinary Writ in the nature of quo warranto against respondents asserting and alleging that respondents as Mayor and Commissioner respectively have no right to hold said respective offices, but are usurpers.

ORIGINAL PETITION FOR EXTRAORDINARY WRIT TO SUPREME COURT

This is an original action to this Court and has never been passed upon or tried in a lower court.

NATURE OF RELIEF SOUGHT

Petitioner seeks the ouster of said respondents from their respective offices of Mayor and Commissioner of Logan City, Utah.

STATEMENT OF FACTS

On the 7th day of November, 1961, at Logan City, Utah an election was duly held for the office of Mayor and one City Commissioner for a term of four years from January 2, 1962; that at said election, Respondent Theral V. Bishop was elected Mayor of Logan City and Respondent Ross L. Covington was elected Commissioner of Logan City; that on the 2nd day of January, 1962, the said duly elected officers duly qualified by taking their oaths of office and have since said time continued to act as officers in those respective capacities as Mayor and Commissioner of said City; that Logan City by virtue of the laws of Utah is a second class city.

Title 10, Chapter 6, Section 18 Utah Code Annotated, 1953, reads as follows: "Election expenses to be published - Penalty - Every elective officer in a city of the first and second class shall within thirty days after qualifying file with the city recorder and publish at least once in a daily newspaper of general circulation in the city a sworn statement of all his election expenses, showing by whom such funds were contributed. In case any such elective officer fails to publish such statement his office becomes vacant, and such officer in addition thereto shall be guilty of a misdemeanor."

It is admitted that the said respondents did not publish within the required 30 days after duly qualifying, but did make an attempt about 154 days after their qualification - on June 7, 1962, to comply with said statute, a copy of which is set out in Amendment to Petition for Extraordinary Writ; that there was no other filing or publishing than that of June 7, 1962.

That petitioner, prior to the commencement of action in this Court, had notified the Attorney General of this State of the failure of respondents to comply with the here quoted statute, but said Attorney General on the 3rd day of April, 1963, gave his answer and refused to act as will be observed from exhibits A, B, C, D, and E, which exhibits were made part of the Petition for an Extraordinary Writ and which shows permission was given by Attorney General to petitioner to file this suit. That said petition was placed before this Court on the 9th day of January, 1964, and since said time has been filed with the Clerk of this Court as well as a cost and damage bond. That thereafter the respondents made a Motion to Dismiss and Answered the Petition. To this Motion, petitioner filed a reply opposing said motion and replying to said answer.

On the 18th day of February, 1964, a hearing was held on this matter and after duly considering this matter, this Court granted an Alternative Writ and ordered petitioner and respondents to file printed briefs.

ARGUMENT

1

THE ALLEGATIONS CONTAINED IN PETITION FOR EXTRAORDINARY WRIT AS AMENDED ARE SUFFICIENT TO SHOW PETITIONER HAS SUFFICIENT INTEREST AND THAT HE MAY BRING ACTION IN HIS OWN NAME BY VIRTUE OF 65B (d) RULES OF CIVIL PROCEDURE.

While the overall question is whether petitioner has stated a good cause of action for the relief sought, it seems to us that it might for the sake of clear discussion to divide

that question up and treat it under separate headings and we have so done. So we proceed now under number 1.

It will be noted that the petition as Amended alleges that petitioner is a citizen, a resident, a qualified voter, a property owner and taxpayer in Logan City, Utah.

In the case of *Morton v. People* (1938) 102 Colo. 489 81 P. (2) 393, in a quo warranto proceedings where pertinent statutes were silent, as in our statute, as to the qualifications of a relator, it was held that in a proceeding testing the sufficiency of the incorporation of a town and as a result the validity of the holding of certain municipal offices by the respondents, the relator's interest was sufficient, against a claim that he was neither a resident nor a taxpayer of the municipality in question, where the facts showed that he had leased and operated a filling station for a number of years, and subsequently purchased the same, though title to the land was taken in the name of his wife rather than himself, and the fact that his residence was not in the municipality was immaterial. The court remarked that a slight interest was sufficient to permit an individual to qualify as relator in a quo warranto action.

The statute authorizing without limitation on its face the bringing of a quo warranto action in the name of the state by a private person on his own complaint when the attorney general refused to act, in order to oust an alleged usurper of public office was held in *State ex rel. Martin v. Ekern* (1938) 228 Wis 645, 280 NW 393, to have validated the bringing of such action by a private relator against the alleged usurper of the office of lieutenant governor of the state, where it was shown that the attorney general had been requested by the relator to bring the action, but had declined to do so. And in the case of *State ex rel. Williams*

v Samuelson (1907) 131 Wis 499, 111 NW 712, a private person was held to have the right to bring his own complaint in quo warranto proceedings where he was shown to be a taxpayer. To the same effect is State ex rel. Waterbury v Martin (1878) 46 Conn 479 and the case of Huff v Anderson (1955) 212 Ga 32, 90 SE 2d. 329, and also the case of Whitehurst v. Jones (1903) 117 Ga 803, 45 SE 49. And it will be further noted in the case of State ex rel. Pooser v Wister 170 So. 736, "that it is enough that he is a citizen and having the law upheld, but this, like all other rules of law, has its limitations."

Petitioner submits that he may bring this action in his own name under 65 B (d) of the Rules of Civil Procedure which reads as follows:

"Action by Private Person Under Subdivision (1) of this Rule." "A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in subdivision (b) 1 of this rule, only if the Attorney General fails to do so after notice. Any such action commenced by a private person shall be brought in his own name."

We believe that the cases here cited and 65 B (d) of the Rules of Civil Procedure here quoted are sufficient to show that petitioner has sufficient interest and that he is a proper party in bringing this action. And that the cases cited and 65 B (d) here cited are a complete reply to respondents Motion to Dismiss on this phase of the case. And we believe that when the Attorney General refused to proceed, petitioner had the same authority to proceed and with the same effect as if the Attorney General had taken over upon request.

In some of these cases a private relator did not even have to bring action in his own name, but could and did

bring it in the name of the state. Our statute, in this regard, says that a private individual shall bring it in his own name. And it is most interesting to note under Subdivision (b) 1 of this rule, there is a comment by the compiler of the 1953 Utah Code Annotated. Vol. 9 page 733 and at top thereof which reads as follows: "Under the above subdivision a private person may commence the action where the attorney-general fails so to do after notice."

II

PETITIONER HAS NO ADEQUATE AND SPEEDY REMEDY IN THE COURSE OF THE LAW AND THEREFORE HE NEED NOT INITIALLY APPLY TO A LOWER COURT FOR RELIEF, BUT MAY ORIGINALLY BRING ACTION TO THE SUPREME COURT.

We believe a sufficient affirmation of this phase of the case lies in paragraph 7 of petition for an extraordinary writ which alleges that the said question herein involved is one that should be determined in the first instance by this Court in the interest of speedy justice, inasmuch as respondents are unlawfully usurping, holding, exercising, and intruding themselves into public offices of the state. The necessary delay in first applying to the lower court and a review of its decision by appeal would be such as to render the remedy essentially useless.

III

SECTION 18 OF TITLE 10 CHAPTER 6 OF 1953 UTAH CODE ANNOTATED IS MANDATORY AND NOT MERELY DIRECTORY AND THAT RESPONDENTS FAILED TO COMPLY THEREWITH, AND THEIR OFFICES BECAME VACANT.

Petitioner submits that this statute is mandatory and

not merely directory for the said section recites that failure to file and publish such a statement within 30 days after the taking oath, his office becomes vacant, and such officer in addition thereto shall be guilty of a misdemeanor.

In Southerlands Statutory Construction 3 Edition, Chapter 58, Vol. 3, page 76, it is observed: "Where the language of the statute is clear and unambiguous the Courts may hold that the construction is obvious from the language used."

In Tuthell v. Rendleiman ⁵⁶~~58~~ N.E. (2) 375, the court said that the general rule in determining whether a statute is mandatory or directory or advisory was as follows: where the terms of the statute are preemtorry and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory. To the same effect is Hudgins v. Morresville Consolidated School District 278 S.W. 769 (1925) and it was held in the case of Annehick v. Trans-american Freight Lines, D.C. Mich. 46 F. Supp. 861, 866, that an employer's violation respecting minimum compensation for overtime work by an employee was "mandatory" and neither ignorance of the employer nor his good intentions were a defense against the penalty.

In our own state in the case of State v. Christensen. 84 Ut. 185, 35 P (2) 775, this Court held that when Mr. Stein failed to qualify within 60 days as the statute required the office became vacant. That the statute was mandatory and self-executing. And in the case Oda v. Elk Grove Union Grammar School District 143 P (2) 490, 492, the Court held that where performance of a statutory requirements is mandatory, there can be no "substan-

tial compliance” with the statute, except in accordance with the particular provisions.

It is stated in Am. Jur. Vol. 11, Sec 74 pp. 699 that “one of the recognized rules in a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or a duty which it imposes may be enforced without a legislative enactment.”

Respondents did not make an attempt to comply with the statute here involved until June 7, 1962, approximately 154 days after they took their oaths of office. And as pointed out in petitioners type written brief heretofore subitted, respondents even then did not comply substantially with the requirements of the said statute not only in point of time, but in point of substance or matters that are required under said 10-6-18. Therefore there was no substantial compliance as claimed by respondents through their counsel, Mr. George D. Preston, either in point of time or substance.

IV.

THAT SAID SECTION 18 OF TITLE 10 CHAPTER 6 UTAH CODE ANNOTATED 1953 HAS NEVER BEEN REPEALED.

Perhaps respondents will again claim that this law has been repealed by Chapter 14, Sections 1 to 47 inclusive and particularly Sections 20-14-9 to 20-14-14.

There is no incompatibility in those Acts and 10-6-18 even by implication. We believe that the repeal of a law is never indulged in unless it is clearly shown that there is such an incompatibility that one must necessarily fall. And

it must be further remembered that 10-6-18 has nothing whatever to do with before elections. It only comes into play after officers have fully qualified as Mr. Bishop and Mr. Covington evidently did, and only then. The Corrupt Practice Act so far as filing election expenses is concerned, applies only before the elected parties take oath, whereas 10-6-18 not only says they must file after qualifying, but in addition thereto must publish in a newspaper of general circulation within the city within 30 days after qualifications and failing to publish, a vacancy exists. There is nothing in the Corrupt Practice Act which says anything about publication.

On this phase of the law petitioner can do no better than cite 50 Am. Jur. pp. ~~535~~⁵⁴², Sec. ~~525~~⁵³⁸ and following section. In these sections it is said that repeal by implication is not favored and that if two constructions are possible the one will be adopted to support the earlier act, rather than to repeal it by implication.

CONCLUSION

That the public has a vital interest in this matter is beyond dispute.

There was submitted to this Court typewritten briefs before the hearing on the 18th day of February, 1964, by petitioner. We would, if possible, incorporate these briefs as part of this printed brief for the Court's consideration.

It is respectfully submitted that the undisputed facts and the law applicable to those facts compel the ouster of respondents, as Mayor and Commissioner of Logan City.

We therefore respectfully submit and request that a

Judgment and Writ should issue out of this Court ousting said respondents from their respective offices as Mayor and Commissioner of Logan City, Utah.

Dated this 17th day of March, 1964.

Respectfully submitted,
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